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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1979

No. 79-1738

RICHARD NIXON, Petitioner,

v.

A. ERNEST FITZGERALD, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction in the premises.

2. Whether a former President is absolutely immune from civil damages liability for intentionally violating a criminal statute and the constitutional

rights of a civil servant by ordering him fired on account of his truthful and authorized testimony to a congressional committee.

REASONS TO DENY THE WRIT

1. This Court Is Without Jurisdiction Because the Pretrial Order Below Was Not a Final Judgment.

This Court's jurisdiction on certiorari to the courts of appeals is limited to "cases in" those courts. 28 U.S.C. § 1254. See United States v. Nixon, 418 U.S. 683, 690 (1974). This case was not in the United States Court of Appeals for the District of Columbia Circuit at the time this petition was filed because that court had granted respondent's motion to dismiss for lack of jurisdiction. 1/

1/ The dismissal by the Court of Appeals created no "split in the circuits" (Pet. 14 n.3) on the issue of appealability before [footnote continued]

Petitioner argues that the dismissal by the Court of Appeals was erroneous because the District Court's order denying summary judgment was a final order appealable under 28 U.S.C. § 1291. (Pet. 13-14.) But in denying summary judgment, the District Court found that "[g]enuine issues of fact remain as to the scope of each defendant's responsibilities" (Pet. 3a), which defendants had the burden of proving as a predicate for the affirmative

[footnote continued]

trial of the immunity defense. One criterion for appealability before trial is that the appeal present "a serious and unsettled question." Community Broadcasting of Boston, Inc. v. FCC, 178 U.S. App. D.C. 256, 259, 246 F.2d 1022, 1025 (1976), quoting Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 547 (1949). In the cases cited by petitioner, the availability of the immunity defense did present "a serious and unsettled question" in the respective circuits at the time the appeals were noted. Here the question had been settled in this Circuit by Halperin v. Kissinger, 606 F.2d 1192 (D.C. Cir. 1979), petition for cert. filed, No. 79-880 (Dec. 7, 1979).

defense of official immunity. See Butz v. Economou, 438 U.S. 478 (1978). Denial of summary judgment because of disputed issues of fact is not final for purposes of review. Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc., 385 U.S. 23, 25 (1966).[2/] There is thus more to be done in the District Court. The factual disputes about what petitioner did and whether what he did was outside the scope of his responsibilities[3/] have still

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2/ Forsyth v. Kleindienst, 599 F.2d 1203 (3d Cir. 1979), petition for cert. filed sub nom. Mitchell v. Forsyth, No. 79-1120 (Jan. 18, 1980), illustrates the reason for this principle. There is no indication in that opinion that the District Court's denial of summary judgment rested on disputed issues of fact, and it was therefore arguably appealable under the collateral order doctrine. Nevertheless, the Court of Appeals itself discovered that the facts were disputed and was obliged to remand for resolution of that dispute. Allowing the appeal in Forsyth thus resulted in precisely the inefficiency and delay which the finality requirement was intended to prevent.

3/ This is not a case involving the President's discretionary authority to

[footnote continued]

to be resolved.

Moreover, these disputes are not collateral to and separable from the principal issues on the merits. See Cohen v. Beneficial Industrial Loan Corp., supra, 337 U.S. at 546. They are the principal issues; they are disputes "enmeshed in the factual and legal issues comprising the plaintiff's cause of action." Mercantile National Bank v. Langdeau, 371 U.S. 555, 558 (1963).

Finally, automatic appealability of denials of summary judgment on absolute immunity grounds threatens an abuse

[footnote continued]

appoint or remove senior executive officers of the United States, but rather involves the removal of an inferior officer, see United States v. Perkins, 116 U.S. 483 (1886), on whose removal Congress has placed statutory restrictions. Fitzgerald v. Hampton, 152 U.S. App. D.C. 1, 8, 467 F.2d 755, 762 (1972) ("Fitzgerald's employment is under legislative protection") (emphasis in original).

of appellate process. Any government official sued for civil damages can plead the affirmative defense of absolute immunity and, on petitioner's theory, seek an immediate appeal as of right of any pretrial order denying that immunity. In the interests of orderly appellate process and economy, the collateral order exception to finality should be more strictly applied, as the Court of Appeals properly did in construing its own jurisdiction here.

2. Even If the Court Had Jurisdiction, There Is No Factual Record For Deciding a Complex Question Of Constitutional Law.

Petitioner is asking this Court to decide what he terms a constitutional question "of exceptional importance to the functioning of the Presidency" with "far-reaching ramifications." (Pet. 9.)

But there could hardly be a worse -- a more incomplete and at the same time disputed -- record for such a decision. The District Court denied summary judgment on the ground that all the material facts "regarding the conduct of all three defendants" are genuinely disputed. (Pet. 2a.) Thus, even if this Court had jurisdiction, it should deny the petition because the case still lacks "the concrete factual setting that sharpens the deliberative process especially demanded for constitutional decision." United States v. UAW, 352 U.S. 567, 591 (1957). Indeed, it is not an overstatement to say that virtually every material fact asserted in the petition is genuinely disputed.

A few examples will suffice.

a. Petitioner minimizes his challenged conduct as "the very kind of activities a President confronts daily," involv-

ing "a trivial matter -- indeed, an internal executive branch personnel dispute * * *." (Pet. 10.) The District Court reached precisely the opposite conclusion:

> [T]he Court has considered the unique demands placed on the time and energies of defendant Nixon as President. There is, however, ample evidence in the record that Fitzgerald's predicament was not simply one of a disgruntled civil servant. Both members of Congress and the press identified plaintiff's case as being of great public importance throughout 1969. Factual circumstances surrounding the termination were repeatedly raised for the President's attention. [Pet. 3a; citations omitted.]

b. Petitioner asserts that he is only being sued for passive conduct -- approving Fitzgerald's termination or failing to reinstate him. (Pet. 10-11.) Not so. He is charged with directing an intention, concerted and conspiratorial

effort to punish Fitzgerald for exercising his First Amendment rights; he is charged with ordering the firing. That claim is squarely grounded on petitioner's own admission in the record:

> I said get rid of that son of a bitch. You know, 'cause he is, he's been doin' this two or three times. So [Secretary of the Air Force] Seamans, who isn't much of a sandbagger, uh, will get rid of him I understand, uh, claimed executive privilege because he knew that I had ordered it. [Pet. 13a.]
>
> * * * * *
>
> I was totally aware that Mr. Fitzgerald would be fired or discharged or asked to resign. I approved it and Mr. Seamans much have been talking to someone who had discussed the matter with me.
>
> No, this was not a case of some person down the line deciding he should go. It was a decision that was submitted to me. I made it and I stick by it. [Presidential News Conference, January 31, 1973.]

c. Petitioner blandly explains away his admissions as a case of mistaken identity (Pet. 6); he contends that he really fired another civil servant, Gordon Rule, who had criticized his appointment of Roy Ash to the Bureau of the Budget.[4/] But there is ample evidence that he was indeed talking about Fitzgerald, who came to his attention by having testified to Congress about cost overruns on the C-5A military transport plane, For example, petitioner told John Ehrlichman the reason for the firing:

> Yeah, well, the point was not that he was complaining about the overruns, but that he was doing it in public[ly]. [Pet. 20a.]

4/ Memorandum in Support of Motion by Defendant Nixon For Summary Judgment on Grounds of Immunity and the Absence of Wrongful Conduct at 14 (Feb. 11, 1980).

The "mistaken identity" claim also fails to explain why, during Fitzgerald's Civil Service appeal of his firing, petitioner authorized the repeated use of executive privilege by Secretary of the Air Force Seamans to conceal the White House role. (Pet. 8a.)[5/]

d. Petitioner suggests that Fitzgerald's job was abolished in a routine reorganization and that the White House staff only feared that this would be "perceived" as retaliatory. (Pet. 4.) On the contrary, the Secretary of Defense

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5/ Petitioner was told that "Seamans was wrong, he had no right to invoke it," but that the White House staff was "coverin' your tracks." (Pet. 17a.) He instructed his staff to "have the most godawful gobbledygook answer prepared. Just put it out on executive privilege. Something that will allow us to do everything that we want." (Pet. 15a.) It is little wonder that the District Court alluded to "White House prevarications and duplicity" and the fact that the White House "continued to conceal." (Pet. 9a, 10a.)

publicly admitted that it was a "firing";[6] memoranda to petitioner described it as a "purge";[7] petitioner remembered co-defendant Bryce Harlow as being "all for canning" Fitzgerald (Pet. 28a); and, as the District Court noted, such a firing had long been prohibited by criminal statute (18 U.S.C. § 1505), "a statute to which Mr. Nixon personally gave strong support while a member of the United States Senate." (Pet. 3a.)

In short, in his "natural eagerness to elicit from this Court a decision at the earliest possible moment," United States v. CIO, 335 U.S. 106, 129 (1948), petitioner is essentially asking the Court to find the facts or to render what will be at best an advisory opinion on a difficult constitutional question with "far-

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6/ Pl. Ex. 258.

7/ E.g., Def. Ex. 103.

reaching ramifications." (Pet. 9.)

3. The District Court Correctly Ruled That a President Is Not Absolutely Immune From All Civil Damages Liability.

The petition should also be denied because the District Court was correct. Respondents in Kissinger v. Halperin, No. 79-880, have stated all the reasons why the denial of absolute immunity is consistent with the decisions of this Court, and respondent adopts them in whole. But they apply with special force to this case, which does not involve any sensitive foreign policy, war-making or national security functions of the Presidency.

Thus, unless this Court is prepared to rule as a matter of law that a President is absolutely immune from civil damage liability for any conduct while in office, it should deny this petition. Here

the conduct presented constitutes the federal felony of retaliating against a congressional witness. But suppose the next case involves a President who orders a break-in to obtain embarrassing private information or to plant incriminating evidence? Or a President who orders the firebombing of an ideologically unpalatable think tank? Or a President who orders the payment of cash bribes to indicted felons to procure their silence? These questions, like the hypotheticals which petitioner poses with respect to foreign policy decisions of the President (Pet. 11), suggest the need for discrimination in the extension of official immunity, not the sweeping endorsement which petitioner seeks on a record which does not yet even establish what he did.

Yet, nothing short of such a sweeping ruling would prevent this case from

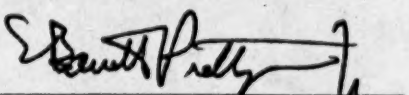
going to trial. The petition submitted by the Solicitor General in Kissinger, supra, declined to seek review of the Court of Appeals' denial of absolute immunity on the statutory claims in that case. The Solicitor General has thus implicitly acknowledged the "general rule * * * that a federal official may not with impunity ignore the limitations which the controlling law has placed on his powers." Butz v. Economou, supra, 438 U.S. at 489. Consequently, were this Court to find petitioner absolutely immune from liability on the constitutional or common law claims in this case, the statutory claims (see Pet. 1a) would nevertheless go to trial. Given that probability, grant of the petition to review a pretrial order of the District Court on this record would be an improvidential use of the Court's time and merely

postpone a trial that will necessarily take place in any event.[8/]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



E. Barrett Prettyman, Jr.

8/ Even assuming that certiorari were granted in Kissinger, supra, we respectfully suggest that the reasons set forth in the text above and in Respondent's Reply to Petitioner's Motion for Expedited Consideration call for an outright denial of certiorari rather than holding this case until Kissinger is decided. There is strong evidence from petitioner's actions before the District Court and the Court of Appeals that what he primarily seeks is a delay of trial. Yet as shown above, a delay is not warranted regardless of the outcome in Kissinger, and respondent should be allowed to proceed with the long-delayed vindication of his claims.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief For Respondent in Opposition to Petition For a Writ of Certiorari Before Judgment to the United States Court of Appeals for the District of Columbia Circuit has been hand-delivered this 6th day of May, 1980, to R. Stan Mortenson, Esquire, Miller, Cassidy, Larroca & Lewin, Suite 500, 2555 M Street, N. W., Washington, D. C. 20037, attorney for Petitioner Nixon.

Peter Raven-Hansen

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